Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CDR WALTER C. SLOANE, M.D.,

Petitioner,

v.

DONNA SHALALA, Secretary of HEALTH AND HUMAN SERVICES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1 Dr. Sloane has been denied important rights to due process of law by the Fourth Circuit refusal to apply the nonretroactivity law rom this Court in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994) to Dr. Sloane's Pre-1991 Civil Rights Act claims and by using a questionable and arbitrary backdoor procedure to vacate the District Court's finding of continuing racial discrimination and by failing to order the District Court to make findings of fact and to rule on Dr. Sloane's Pre-1991 Civil Rights Act claims as required by Rule 52.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Walter Sloane, M.D. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit entered in this proceeding on November 18, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished and appears in Appendix C hereto. The opinion of the United States District Court for the District of Maryland appears at Appendix E hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 18, 1998. A timely petition for rehearing was denied on January 14, 1999, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statutes involved are Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e *et seq.*, and the Civil Rights Act of 1991, 42 U.S.C.§ 1981a which creates a right to recover compensatory and punitive damages and to demand a jury trial for certain violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981a(a) & (c).

STATEMENT OF THE CASE

At the time Dr. Sloane entered the United States Public Health Service (USPHS), there was no requirement that physicians in the USPHS hold a medical license. However, in 1986, the USPHS announced a new policy which would require all of its physicians to eventually become licensed by 1988. The USPHS also implemented a process for obtaining a

waiver from the licensure requirement for physicians who were not in clinical care occupations and who were so far removed from medical school that it would be a major disruption for them to have to stop their careers and study for licensure. This waiver provision was not applied fairly to the black physicians and was a benefit available only to unlicensed white physicians.

The applicable regulation provided that, under particular circumstances, a physician was eligible to receive a waiver. However, the primary question was whether or not the physician, dentist or veterinarian actually engaged in any clinical, patient care responsibilities. Dr. Sloane met all of the requirements for receiving a waiver, and he applied for a waiver in 1988 and was continuously considered for and denied a waiver each

year thereafter. A key feature of the waiver process was the Licensure Waiver Board (LWB). The LWB was formed to review the applications for waiver by physicians in the USPHS. However, the evidence in the record indicated that many of the decisions that were ostensibly made by the LWB were actually made by discriminatory members of the Division of Commissioned Personnel (DCP), a branch of the USPHS. All of the persons in the DCP who manipulated the licensure waiver board were white. Dr. Sloane was notified in March, 1989, that his application for a waiver from the USPHS licensure requirement had been denied. Furthermore, Dr. Sloane was ordered to prepare a plan to become licensed. This denial of licensure waiver to Dr. Sloane was continuing according to LWB Chairman Kenneth Mortisugu.

There was substantial evidence that there was inconsistent treatment of Dr. Sloane and other African-American medical officers by the LWB and the USPHS personnel officers as compared to similarly situated white medical officers. There were white medical officers who had references to clinical care in their billets who were granted waivers. A waiver was granted to Dr. Thomas Lewis, a white medical officer, despite the fact that his work involved hospital computer systems that were used for the care of patients. However, another black physician, Dr. Lemuel Clark, had his provisional waiver revoked because his billet, or job description, alluded to the word "clinical".

One of the reasons articulated for the denial of a waiver to Dr. Sloane was that he did not have as much time in

service as the other white physicians who were granted waivers. Time in service was not one of the criteria set forth in the licensure regulation. This basis for denial is a pretext because there were non- black officers who had similar or less time in service than Dr. Sloane who were granted waivers. Dr. Lemuel Clark, an African-American, finished medical school in 1973 and had his career characterized by the USPHS as "developing" and was denied a waiver, while Dr. Lin, who is Asian, graduated from medical school in 1975 and had his career characterized by the USPHS as "fully developed" and was granted a waiver. The Chairman of the LWB, Dr. Moritsugu, is Asian and he knew that Dr. Samuel Lin was Asian when he participated in the LWB which granted Dr. Lin a waiver. Moreover, Dr. Sloane was Dr. Samuel Lin's

mentor. Dr. Sloane had been on active duty a longer time than Dr. Lin. These career classifications were pretexts made by white individuals in the DCP before names were ever submitted to the LWB.

Another pretext for the denial of a waiver to Dr. Sloane was the fact that he had no budgetary or supervisory responsibilities. There is no provision in the licensure regulation that speaks to budgetary or supervisory responsibilities as criteria for deciding a waiver request. This basis of denial of the waiver was shown to be pretext by the fact that there were white officers, such as Dr. Bernard Talbot, who had no budgetary responsibility and no supervisory responsibilities who were granted waivers.

Dr. Lemuel Clark, a black medical officer, supervised several people and

controlled a budget of over $600,000.00, was still denied a waiver.

A white veterinarian who provided direct patient care, Dr. Arco, was granted a waiver, while a black veterinarian who provided direct patient care, Dr. Richard Killens, was denied a waiver. Unlicensed white doctors were treated differently than equally qualified unlicensed black physicians.

Dr. Sloane had support from the FDA to receive a waiver. White doctors were granted waivers despite the fact that they had no support from their agencies. Dr. William Mayer received a waiver approved by his good friend "Chick;" "Chick" was the reference used by Dr. Mayer to the then Surgeon General. More importantly, Dr. Mayer's waiver request did not go through any LWB process, but went straight from the recommendation of Captain William

Fromherz in DCP. The waiver process was unlawfully reserved for only the white physicians in the USPHS.

There were two separate disputes (jury and non-jury issues) presented for resolution below. The problem presented was getting the District Court to decide the non-jury pre-1991 Act claims. Thus, this dispute is concerned with a non-ruling on Petitioner's pre-1991 Act claims only. The Fourth Circuit has ducked this issue by questionable judicial procedures and rulings. There is a need for an open discourse on institutional employment discrimination in the Commission Corps of the U.S. Public Health Service for allowing unlicensed white physicians to be treated differently than unlicensed black physicians based solely on race. Or stated more bluntly, unlicensed black physicians are treated as inferior to unlicensed

white physicians. The Fourth Circuit evaded a resolution of this issue in a manner that needs to be intellectually and legally reviewed and corrected.

REASONS FOR GRANTING THE WRIT

Petitioner is filing this petition because the Fourth Circuit misapprended relevant evidence and points of law when rendering its decision. In the interest of substantial justice, a writ is required to give this Court an opportunity to correct the errors, oversight and misapprehension of judicial procedures, points of law and disputes left open in the Fourth Circuit's opinion.

In order to understand the suspicious course that this case took in the Fourth Circuit, it must be kept in mind that Dr. Sloane alone brought the appeal to the Fourth Circuit. The government did not appeal from any matters or rulings of the

District Court. By a peculiar and strange opinion dated November 18, 1998, the Fourth Circuit unfairly entered judgment vacating the judgment of the District Court with instructions to dismiss.[1] Petitioner never had an opportunity to be heard on this issue before the Fourth Circuit. This has the effect of placing the imprimatur of the federal judiciary on unlawful institutional racial discrimination against black physicians in the Public Health Service. Petitioner is sounding the alarm of the denial of his voice and rights in the Fourth Circuit by bringing this petition to vindicate a serious miscarriage of justice.

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[1] The order of the Fourth Circuit is found at Appendix C.

A. Contrary to the Fourth Circuit's Opinion, the District Court never ruled against Dr. Sloane "on all of his discrimination claims"

Neither the District Court nor the jury ever ruled on Dr. Sloane's Pre-1991 Act claims. Contrary to the Fourth Circuit's assertion in its opinion, the District Court never ruled against Dr. Sloane on "all of his discrimination claims." Appendix C at 7a. Dr. Sloane's Pre-1991 Act claims were based solely on unlawful discrimination under Title VII. In its initial ruling, the Fourth Circuit pointed to no ruling in the record of this case to support its assertion. However, in its ruling denying a rehearing, the Fourth Circuit amended its original opinion attempting to identify a phantom ruling of the District Court as

follows:"on page 7 of the opinion,'J.A.at 13' should be read `J.A. at 37'". Appendix A. This amendment is still unavailing in identifying and correcting the phantom ruling of the District Court on Petitioner's pre-1991 Act claims. The amendment simply cite to the judgment that was entered on the jury's verdict on the post-1991 Act claims. See, Appendix G. The Fourth Circuit's attempts to pinpoint such a ruling on Dr. Sloane's Pre-1991 Act claims demonstrates its misapprehension of the factual and legal points raised by Dr. Sloane.

The Fourth Circuit opinion is not indicative of fair play nor reflective of any ruling by the District Court on Dr. Sloane's pre-1991 claims. There is nothing at J.A. 37 or anywhere else in the record to reflect any ruling by the District Court on Dr. Sloane's pre-1991

claims. The Fourth Circuit handling of this issue is simply wrong, inadequate and must be reversed.

B. The Fourth Circuit is wrong for holding that "the District Court should have dismissed Petitioner's Title VII claims

The Fourth Circuit's opinion ignored a fundamental tenet of federal appellate practice, i.e,"a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party." United States and Interstate Commerce Commission v. American Railway Express Co., 265 U.S. 425, 435 (1924); Massachusetts Mutual Life Ins. Co. v. Ludwig ,426 U.S. 479, 481(1976). The Fourth Circuit's opinion has unfairly permitted the government to attack the ruling of the District Court on continuing violation with a view for lessening the

rights of Dr. Sloane from an earlier favorable order by the District Court on his pre-1991 Act claims. The government must not be allowed to do this.[2] While the Fourth Circuit may consider other rationale for affirming the District Court without an appeal by Appellee, the Fourth Circuit is prohibited from vacating a favorable ruling for Petitioner when the government has not filed an appeal of the district court's decision. United States and Interstate Commerce Commission v. American Railway Express Co., 265 U.S. at

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2 "In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." United States and Interstate Commerce Commission v. American Railway Express Co., 265 U.S.425,435(1924);Massachusetts Mutual Life Ins. Co. v. Ludwig ,426 U.S. 479,481 (1976).

435; Massachusetts Mutual Life Ins. Co. v. Ludwig 426 U.S. at 481.

Consequently, it was improper for the Fourth Circuit to have ruled that the judgment of the District Court should be vacated and remanded with instruction to dismiss without giving Dr. Sloane a full and fair opportunity to be heard on this matter pursuant to a normal briefing schedule and argument.

The District Court's finding on continuing violation was a factual finding that was reviewable on a clearly erroneous standard and not a de novo standard of review. The Fourth Circuit has conducted an improper de novo review on the issue of intentional discrimination on a continuing violation theory where the District Court's finding on this matter was supported by evidence in the record. See, Anderson v. City of Bessemer City, North

Carolina, 470 U.S. 564,573 (1985)("Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a)"). If the Fourth Circuit were going to make a de novo review of a factual finding concerning continuing intentional discrimination, Dr. Sloane was entitled to the process due under the Federal Rules of Appellate Procedure that would have been available to him had the government filed a cross-appeal attacking the district court's ruling and finding of a prima facie case of continuing intentional discrimination. However, even assuming that the Fourth Circuit was empowered to consider the district court's ruling on continuing intentional discrimination, it could only do so under the clearly

erroneous test and erred by making its own findings on the issue of continuing intentional discrimination. See also, Pullman-Standard v. Swint, 456 U.S. 273,287-88 (1982)(Clearly erroneous rule applicable because question of intent to discriminate in seniority system is a question of fact; not a mixed question of law and fact).

More specifically, the Fourth Circuit is clearly erroneous in its assertion that "appellant does not show that he was suffering from a "continuing violation" at the time he sought EEO counseling." Appendix C at 9a. The objective evidence in the record demonstrates that Dr. Sloane was suffering from continuing intentional discrimination at the time he sought EEO assistance and when he later obtained EEO counseling. Moreover, the Fourth Circuit misapprehends the law and the power of the

Supreme Court of the United States when it states that this "Circuit has never adopted a test for what constitutes a continuing violation...." This is not correct. The Fourth Circuit, as have other Circuits, has adopted and applied the test for continuing violation as set forth by this Court in United Air Lines, Inc. v. Evans, 431 U.S. 553,558 (1977)("the critical question is whether any present violation exists"). While the record supports a continuing violation under Evans, the Fourth Circuit ruling is now inconsistent with Evans and is in conflict with other Circuit Courts on the application of Evans to a continuing violation.

C. The Fourth Circuit's decision misapprehended the applicable law and the Fourth Circuit's fact finding is clearly erroneous and overlooks material facts in dispute in this case

Contrary to the Fourth Circuit's conclusion, there is no finding by the jury on Dr. Sloane's pre-1991 claims. Dr. Sloane's pre-1991 claims were never before the jury and the District Court never performed its duty to make findings of fact on Dr. Sloane's pre-1991 claims as required by Rule 52. Consequently, the Fourth Circuit's puzzling reference to the jury's action on Dr. Sloane's post-1991 Act claims is surplusage and should have had no bearing on Dr. Sloane's appeal of his pre-1991 Act claims as a matter of law. See, Landgraf v. USI Film Products, 114 S.Ct. At 1507-08.

Moreover, the Fourth Circuit's fact-finding not only unfairly portrays Dr. Sloane in an ominous and inferior light but is clearly erroneous, flawed and inappropriate for a judicial body. For example, the Fourth Circuit's opinion erroneously states that Dr. Sloane took six years to complete his "clinical training." Appendix C at 6a. The truth is that Dr. Sloane completed clinical programs in two areas of medicine: internal medicine and ophthalmology. The Fourth Circuit's fact finding is intellectually biased and flawed, and thus clearly erroneous, in that it wrongfully states that Dr. Sloane received in "1993 and 1994" "poor performance evaluations from his supervisor at the FDA." Appendix C at 7a. This is not true. Dr. Sloane's evaluations in 1993 and 1994 were not poor. To the contrary, Dr. Sloane's

overall evaluations in 1993 and 1994 were "competent" and "fully effective". The Fourth Circuit has confused the facts of this case and unwittingly adopted the biased assumptions of the PHS that because Dr. Sloane is a black unlicensed physician, he is somehow intellectually inferior to similarly situated unlicensed white physicians in the PHS. It is obvious that the Fourth Circuit's misapprehension concerning the true facts of this case has colored its strange ruling vacating and remanding the District Court's ruling below without ever requiring the District Court to properly find the facts and rule on Dr. Sloane's pre-1991 Act claims.

The Fourth Circuit's finding that Dr. Sloane's first contact with the EEO office on August 16, 1993 was not within forty-five days of an alleged

discriminatory event is clearly erroneous. Appendix C at 9a. The Fourth Circuit incorrectly used June 1, 1993 as the date to commence the tolling of the forty-five day time period. The Fourth Circuit erroneously found and stated:"The nearest allegedly discriminatory event -- appellant's poor [sic] performance evaluation from his FDA supervisor -- occurred no later than June 1, 1993, well outside the forty-five day period." Id. Here, the Fourth Circuit misapprehends the true and correct date for the forty-five day period. The June 1, 1993 date is not the correct date for the evaluation of Dr. Sloane and should not have been used by the Fourth Circuit. The correct dates for calculating the forty-five day period runs from July 8, 1993 to August 14, 1993. According to this correct date and other objective evidence, Dr. Sloane signed the

1993 COER on July 8, 1993 and his supervisor did not sign the COER until July 22, 1993. Both the July 8 and July 22, 1993 are well inside the forty-five day period. Moreover, the attachments which are a part of the 1993 COER from Dr. Sloane and his supervisor are dated July 27 and August 14, 1993. Both dates are well within the forty-five or thirty day period for rendering Dr. Sloane's contact with the EEO office timely. The Fourth Circuit misapprehends the importance of accurate fact finding in the district court and erroneously relied too heavily on the misleading and improper representation in the brief of the government. Open, fair and impartial proceedings in the Fourth Circuit would have corrected these serious flaws and inappropriate racial assumption about Dr. Sloane.

In addition, the Fourth Circuit's fact finding is clearly erroneous and flawed in its speculation about actions taken by the Government on Dr. Sloane's application for waiver from the licensure requirements in 1988 and 1989. The Fourth Circuit's statement that the "LWB recommended rejecting his [Sloane's] application, and, in 1989, the Surgeon General denied the application" is erroneous. Appendix C at 7a. This baseless finding by the Fourth Circuit concerning the denial of Dr. Sloane's application is not supported by the record or testimony from the Surgeon General. This was a pre-1991 Act fact that the District Court was required by Rule 52 to decide. The record below is devoid of any action taken by the Surgeon General or the LWB in denying Dr. Sloane a waiver pursuant to the licensure waiver policy in

1989. Instead, the record demonstrates that certain white individuals in PHS denied Dr. Sloane's waiver for impermissible reasons (his race) while at the same time granting waivers to unlicensed white physicians for impermissible reasons (their race). The only criteria that guided the grant or denial of a waiver by the biased PHS individuals was the race of the applicants. It is inappropriate for the Fourth Circuit to ignore this serious civil rights matter.

D. Dr. Sloane has been denied important rights to due process

The cumulative errors of both the Fourth Circuit and the District Court have had the inevitable effect of denying Dr. Sloane his constitutional rights to due process of law.

The Fourth Circuit and the District Court erred in failing to decide the issues tried under Title VII of the Civil Rights Act of 1964 brought by Dr. Sloane which occurred prior to the enactment of the Civil Rights Act of 1991. Dr. Sloane's continuing discrimination claims under Title VII arose out of the PHS's continuing denial of his waiver from the licensure requirement. The teaching of this Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct 1483 (1994), required the District Judge to decide Dr. Sloane's pre-1991 Title VII claims which arose before the enactment of the Civil Rights Act of 1991. See also, Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994). In this case, the Fourth Circuit seriously erred in finding that the District Court decided Dr. Sloane's Pre-1991 Act claims.

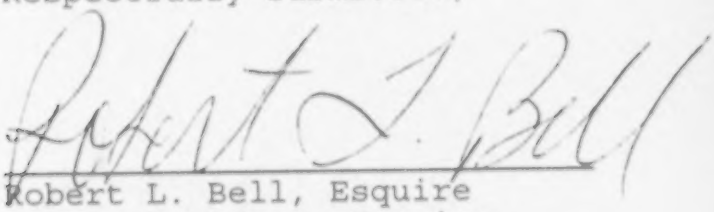
E. Dr. Sloane is Entitled to A Ruling on His Pre-1991 Act Claims

Rule 52 imposes a duty upon the District Court to make fact finding and to rule on Dr. Sloane's pre-1991 Act claims. As set forth above, the District Court has not performed its judicial duty pursuant to Rule 52 by ruling on Dr. Sloane's pre-1991 Act claims. The Fourth Circuit has not -- as it cannot -- identify any ruling by the District Court on Dr. Sloane's pre-1991 Act claims. Merely citing to the judgment entered by the District Court on post-1991 Act claims is inadequate and insufficient as a matter of law. See, Landgraf, 511 U.S. 244 (1994). This Court should order the Fourth Circuit and the District Court to perform their judicial duties under Rule 52 by explicitly ruling on Dr. Sloane's pre-1991 Act claims.

CONCLUSION

For these foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,



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APPENDICES

APPENDIX A

Filed: January 21, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2295
(CA-95-349-AW)

Walter C. Sloane, etc.,

Plaintiff - Appellant,

Versus

Donna Shalala, etc.,

Defendant - Appellee.

ORDER

The court amends its opinion filed November 18, 1998, as follows:

On page 7, first paragraph, line 5 – "J.A. at 13" is corrected to read "J.A. at 37."

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 14, 1999

No. 97-2295
CA-95-349-AW

WALTER C. SLOANE, CDR, M.D.

Plaintiff - Appellant

V.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IT IS FURTHER ORDERED that the Court amends the opinion as follows: on page 7 of the opinion, "J.A. at 13" should be read "J.A. at 37."

For the Court,

/s/ Patricia S. Conner
CLERK

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WALTER C. SLOANE, CDR, M.D.,
Plaintiff-Appellant,

V. No. 97-2295

DONNA SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt,
Alexander Williams, Jr., District Judge.
(CA-95-349-AW)

Argued: September 23, 1998

Decided: November 18, 1998

Before WIDENER and LUTTIG, Circuit Judges, and
MAGILL, Senior Circuit Judge of the United States Court
of Appeals for the Eighth Circuit, sitting by designation

Vacated and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert L. Bell, LAW OFFICES OF ROBERT L. BELL, Washington, D.C., for Appellant. Allen F. Loucks, Assistant United States Attorney, baltimore, Maryland, for Appellee. **ON BRIEF:** C. Vaughn Adams, Christopher Leon Jones, Jr., LAW OFFICES OF ROBERT L. BELL, Washington, D.C., for Appellant. Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant Walter C. Sloane challenges the district court's judgment on his claims of racial discrimination under Title VII of the Civil Rights Act of 1964. Because Sloane failed to exhaust the available administrative remedies in a timely fashion before pursuing this action, we vacate and remand with instructions to dismiss.

I.

In 1974, upon graduating from the Howard University College of Medicine, appellant Walter C. Sloane became a uniformed medical officer in the commissioned corps of the Public Health Service (PHS). Upon commissioning, Sloane spent six years completing his clinical training, then served for one year as a staff ophthalmologist in a PHS hospital. Sloane was next stationed at the Food and Drug Administration (FDA), where he proceeded to serve in a variety of positions. By 1986, Sloane was reviewing applications for investigational ophthalmological devices in the Center for Devices and Radiological Health at the FDA.

In 1986, the PHS issued a regulation requiring all of its officers to be licensed by the relevant state authorities. The purpose of this regulation was to subject PHS officers to the same requirements applicable to doctors in the private sector. The regulation required all officers to comply with the requirement by December 31, 1988, and established sanctions for noncompliance, including loss of bonuses, exclusion from consideration for promotions, and involuntary retirement.

The regulation created a Licensure Waiver Board (LWB) to process requests from PHS officers for waivers from the licensing requirement. The role of the LWB was to make recommendations to the Surgeon General on these requests. The regulation set out the following four criteria to be used by the LWB in processing waiver requests:

(1) The likelihood, nature, and amount of patient contact in the position;

(2) Whether the role of the individual is essential to the mission of the agency or the program;

(3) The impact of the waiver on the potential risks to individual patients, the program's constituency, and the public;

(4) The specific reason(s) why the officer cannot obtain the appropriate credentials.

J.A. at 891.

In December 1988, Sloane applied for a waiver. The LWB recommended rejecting his application, and, in March 1989, the Surgeon General denied the application. From 1989 to 1995, Sloane repeatedly attempted to come into compliance with the licensing requirement by taking the state licensing examination, but failed the examination each time. In 1991, acting on the recommendation of the LWB, the Surgeon General imposed sanctions on Sloane for his failure to comply with the licensing requirement, including loss of bonuses, exclusion from consideration for temporary promotions, and referral for involuntary retirement in three years' time. In 1993 and 1994, Sloane also received poor performance valuations from his supervisor at the FDA.

On August 16,1 993, Sloane first approached the local EEO office regarding alleged discrimination by the PHS and the FDA. On January 10, 1994, Sloane filed an informal EEOC complaint; on March 10, 1994, he filed a formal EEOC complaint.

On February 2, 1995, Sloane commenced this action against appellee Donna Shalala and two other government officials, alleging discrimination and retaliation under both Title VII and the ADEA. The trial judge dismissed Sloane's retaliation claims at the end of his case in chief. After a jury

trial, the district court ruled against Sloane on all of his discrimination claims. Sloane now brings this appeal, solely on the basis of his Title VII racial discrimination claims.

II.

As a threshold matter, appellee contends that the district court should have dismissed appellant's Title VII claims because appellant failed to exhaust the available administrative remedies in a timely manner. We agree.

It is well-established that a district court must dismiss a title VII claim if the plaintiff fails to seek EEO counseling within the prescribed time period. See, e.g., Nealon v. Stone, 958 F.2d 584, 589-90 (4th Cir. 1992); Zografov v. V.A. Medical Center, 779 F.2d 967, 968-69 (4th Cir. 1985). Appellant appears to have been subject to two different limitation periods. On the one hand, as a government employee, appellant was required to seek EEO counseling within forty-five days of the allegedly discriminatory event. See 29 C.F.R. § 1614.105(a)(1) (1998). On the other hand, as a PHS officer, under the more stringent standards of the PHS's own regulations, appellant was required to seek EEO counseling within thirty, rather than forty-five, days of the precipitating incident. J.A. at 1363. Assuming, arguendo, that the more generous general regulation for government employees governs appellant's case, appellant must demonstrate one of two things: either that he sought EEO counseling within forty-five days of one of the allegedly discriminatory events pleaded in his complaint, or that he was subject to a "continuing violation" at the time he sought EEO counseling.

Appellant fails in both respects. First, appellant does not demonstrate that he sought EEO counseling within forty-

five days of an allegedly discriminatory event. Even assuming that appellant can be said to have sought EEO counseling on August 16, 1993 - the date of his first contact with the EEO office - rather than on January 10, 1994 - the date he filed his first EEOC complaint - appellant has not alleged that any discriminatory events occurred in the preceding forty-five days. The nearest allegedly discriminatory event - appellant's poor performance evaluation from his FDA supervisor - occurred no later than June 1, 1993, well outside the forty-five day period.

Second, appellant does not show that he was suffering from a "continuing violation" at the time he sought EEO counseling. This Circuit has never adopted a test for what constitutes a continuing violation; our sister circuits, however, have developed a number of variations. See, e.g., DeNovellis v. Shalala, 124 F.3d 298, 307 (1st Cir. 1997) (finding continuing violation in cases in which violation is systemic or serial); Malhotra v. Cotter & Co., 885 F.2d 1305, 1310 (7th Cir. 1989) (finding continuing violation whenever "plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment"); Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983) (finding continuing violation when three-prong test involving type of conduct, frequency of alleged acts, and degree of permanence of acts is satisfied).

It is unnecessary for us to adopt any of these tests in this case, for the simple reason that appellant fails to establish a continuing violation under any of them. As the Supreme Court has stated, the "critical question" in a continuing violation case is "whether any present violation exists." United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977). Events that simply constitute the inevitable consequences of an earlier, allegedly discriminatory decision do not suffice to create a continuing violation, see Delaware State College v. Ricks, 449 U.S. 250,

257-58 (1980), nor do "separate and completed events," Lawson v. Burlington Industries, Inc., 683 F.2d 862, 863-64 (4th Cir. 1982).

In this case, all of the allegedly discriminatory events that occurred after the original denial of appellant's waiver application in 1989 were either consequences of that denial, or entirely separate events altogether. The imposition of sanctions on appellant in 1991 directly resulted from his failure to comply with the licensing requirement in the wake of the allegedly discriminatory denial of his waiver application in 1989. And appellant's poor performance evaluations in 1993 and 1994 had no connection whatsoever with the denial of his waiver application in 1989: unlike the denial of the waiver, which involved officials at the PHS, the agency that employed appellant, the poor performance evaluations were conducted by appellant's supervisor at the FDA, the wholly separate agency at which appellant was stationed at the time.

Appellant can avoid the requirement of timely exhaustion only by providing evidence that he was unaware of the time limits for seeking EEO counseling, see 29 C.F.R. § 1614.105(a)(2) (1998), or that the government engaged in affirmative misconduct in connection with his failure to seek timely counseling, see Zografov, 779 F.2d at 969-70. Appellant makes no such showing. Therefore, the district court should have dismissed his claims.

III.

Even if we were to hold that appellant had exhausted the available administrative remedies in a timely manner, we would nevertheless reject his underlying substantive claims. Appellant makes two claims: that the trial judge erred by

failing independently to adjudicate equitable claims arising from events occurring before the enactment of a jury right, and that the jury erred by finding that the justifications offered by the PHS for its allegedly discriminatory behavior were not pretextual. Each of these claims lacks merit.

Appellant bases his first claim on section 102 of the Civil Rights Act of 1991, which had two significant consequences for plaintiffs bringing Title VII actions. First, the provision allowed Title VII plaintiffs to recover damages, provided that the actionable conduct occurred after the Civil rights Act of 1991 took effect. See Landgraf v. USI Film Prods., 511 U.S. 244, 281-83 (1994). Second, it entitled Title VII plaintiffs to a jury trial, provided the same condition was met. See id. At 280-81.

Based on this provision, appellant argues that the trial judge erred by failing to make separate rulings of law on those Title VII claims that were based on pre-1991 conduct ("pre-1991 claims"), for which only an equitable remedy was available. This claim, however, is flawed for two reasons. First, and more simply, at no stage during the trial did appellant ask the judge to rule on any separate pre-1991 claims. To the contrary, as noted above, appellant contended that he was subject to a continuing violation at the time he commenced this action, an argument that squarely forecloses the existence of any separable pre-1991 claims at all. Second, to the extent that any distinct pre-1991 claims did exist, the judge resolved those claims at the conclusion of the trial. Although the judge did not refer to "pre-1991 claims" in his final order, he expressly ruled against appellant on all of his claims, see J.A. at 13, and subsequently denied appellant's motion for "judgment on pre-1991 claims" on the grounds that those claims had already been decided in his final order, id. At 835. Consequently, because

the trial judge did resolve any separate claims arising from events occurring before the enactment of a jury right, to the extent that such claims could be said to exist, the trial judge committed no error.

Appellant next claims that the jury erred by finding that the justifications offered by the PHS for its allegedly discriminatory behavior were not pretextual. To succeed on this claim, appellant must demonstrate the jury's finding was not supported by substantial evidence in the record as a whole. See, e.g., Evington v. Forbes, 742 F.2d 834, 835 (4th Cir. 1984). We hold that appellant has failed to make such a showing. Indeed, to the contrary, as the government points out, appellant fails even to demonstrate that the individuals involved in the allegedly discriminatory behavior were aware of his minority status. Two members of the LWB testified that the LWB did not have information on the race of applicants while considering waiver applications, see J.A. at 695, 697-98, 729, and the Surgeon General testified that he had no knowledge of appellant's race while reviewing the LWB's recommendation, see id. At 680. No evidence in the record contradicts this testimony. In the absence of any evidence even to suggest that any of the principal actors were aware of appellant's race, it is impossible to conclude that the justifications for their actions were pretextual to hide a racial motive. In any event, because the jury's finding on pretext was supported by substantial evidence in the record, we hold that finding.

CONCLUSION

The judgment of the district court is vacated and remanded with instructions to dismiss.

VACATED AND REMANDED

APPENDIX D

IN THE UNITED STATES DISTRICT OURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

CDR WALTER C. SLOANE, M.D.	:	
Plaintiff,	:	
	:	
V.	:	C.A. No. AW-95-349
	:	Judge Alexander
DONNA SHALALA,	:	Williams, Jr.
Secretary of Health and Human	:	
Services	:	
Defendant.	:	

MOTION FOR RECONSIDERATION OF OR RELIEF FROM RULING DENYING PLAINTIFF'S POST-TRIAL MOTION FOR JUDGMENT ON PRE-1991 MATTERS

Motion "DENIED" this 5th day of September. 1997.

/s/
ALEXANDER WILLIAMS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CDR WALTER C. SLOANE, M.D.	*	
	*	
Plaintiff,	*	
	*	
V.	*	
	*	
DONNA SHALALA,	*	Civil No. AW-95-349
Secretary of Health and Human	*	
Services	*	
	*	
Defendant.	*	

ORDER

In accordance with the Memorandum Opinion, it is this 18th day of August, 1997 **ORDERED**:

1. That the Plaintiff's Motion for Judgment of 1991-1995 Claims OR, in the Alternative, For New Trial on 1991 Claims and his Motion For Judgment on Pre-1991 Claims BE, and the same hereby ARE, **DENIED**; and

2. That the matter of costs will be referred to the Clerk of the Court for resolution; and

3. That the Clerk of the Court mail copies of the Memorandum Opinion and this Order to all counsel of record.

[Signed]
Alexander Williams, Jr.
United States District Court Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CDR WALTER C. SLOANE, M.D.	*	
	*	
Plaintiff,	*	
	*	
V.	*	
	*	
DONNA SHALALA,	*	Civil No. AW-95-349
Secretary of Health and Human	*	
Services	*	
	*	
Defendant.	*	

MEMORANDUM OPINION

Presently pending before the Court are CDR Walter C. Sloane's, ("Plaintiff") Motion for Judgment of 1991-1995 Claims OR, in the Alternative, For New Trial on 1991 Claims; and Motion for Judgment on Pre-1991 Claims. Donna Shalala ("Defendant") filed an objection to which Plaintiff replied. No hearing is deemed necessary. Local Rule 105.6 (D. Md.). For the reasons stated below, the Court denies Plaintiff's motions.

I. Background

Plaintiff had his Title VII claim tried before a jury in this Court on June 17, 1997, through June 24, 1997. The jury ruled in favor of Defendant. Plaintiff's Title VII claim was based on employment discrimination; specifically, Plaintiff argued that he was discriminated against when his requests for a waiver from the USPHS' licensure requirement were denied.

A. Standard of Review

A motion for judgment notwithstanding the verdict should be denied when, giving the nonmoving party the benefit of every legitimate inference, there was evidence which a reasonable jury could return a verdict for the nonmoving party. Equal Employment Opportunity Commission v. Marion Motel Associates, 763 F.Supp. 1338, 1340 (4th Cir. 1991) (citing Mays v. Pioneer Lumber Corp., 502 F.2d 106, 107 (4th Cir.

1974). In determining this, the court must view the evidence in a light most favorable to supporting the jury verdict. Id. Furthermore, a mere scintilla of evidence is not enough to prevail in this motion. Id. Moreover, "jury verdicts must be accorded great deferenc3e." Cranford v. Moore, 587 F.Supp. 712 (4th Cir. 1984).

On the issue of granting a new trial, courts do not grant them "unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." Marion Motel, at 1340 (citing 11 C. Wright & A. Miller, Federal Practice and Procedure §2803 (1973)). Under Fed. R. Civ. P. 59, "a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice,

he must set aside the verdict, . . . and grant a new trial." Id. (Citing Poynter v. Ratcliff, 874 F.2d 219, 223 (4th Cir. 1989).

B. Plaintiff's Motion

Plaintiff claims that he established a prima facie case of discrimination. Specifically, he argues that Defendant's articulated non-discriminatory reasons for refusing to grant Plaintiff's request for a waiver is nothing more than a pretext for unlawful discrimination.

The jury sat on this case for one week and this Court is satisfied there was sufficient evidence to support the verdict. Further, the Court is not inclined to disturb the jury's finding of fact. Moreover, the Court is convinced that a reasonable jury could find that Defendant's articulated non-discriminatory reasons for failing to grant a waiver was not a pretext for discrimination. Accordingly, Plaintiff's motion for judgment notwithstanding verdict is denied.

Plaintiff points to no legitimate reason this Court should grant his motion for a new trial. Indeed, Plaintiff asserts no evidentiary point that infected the trial, nor does he argue that there is any newly discovered evidence that requires a new trial. Moreover, the Court believes that the remaining issues set forth in Plaintiff's two motions as to the Pre-1991 and 1991-1995 claims were previously addressed by the Court in its earlier rulings. Accordingly, Plaintiff's motion for new trial will be denied.

CONCLUSION

For the reasons stated above, the Court will deny Plaintiff's Motion for Judgment of 1991-1995 Claims OR, in the Alternative, For New Trial on 1991 Claims; and Motion For Judgment on Pre-1991 Claims. An Order in accordance with this Opinion will follow.

8-18-97
Date

Signed
Alexander Williams, Jr.
United States District Court Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CDR WALTER C. SLOANE, M.D. Plaintiff	*	
vs.	*	Civil No. AW-95-349
DONNA SHALALA, Secretary of Health and Human Services Defendant	*	

ORDER OF JUDGMENT

The Jury having returned a verdict in favor of Defendnat, DONNA SHALALA against the Plaintiff, WALTER C. SLOANE it is, this 24th day of June, 1997,

ORDERED

1. Judgment is entered in favor of Defendant, DONNA SHALALA against the Plaintiff, WALTER C. SLOANE; and

2. Any and all prior rulings made by this court disposing of any claims against any parties are incorporated by

reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58.

3. And it is further ORDERED that this case be CLOSED.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge